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No. 86-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOS ANGELES RAIDERS, A LIMITED PARTNERSHIP,
Petitioner,

v.

NATIONAL FOOTBALL LEAGUE,
AN UNINCORPORATED ASSOCIATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondents National Football League, *et al.* ("NFL" or "League"), submit this brief in opposition to the petition for a writ of certiorari filed by the Los Angeles Raiders. The petition seeks review of that portion of a decision of the Court of Appeals for the Ninth Circuit that remands an antitrust money judgment in favor of the Raiders with instructions to reduce that judgment to account for the value of the Los Angeles franchise which the Raiders seized from the League. The Raiders' petition identifies no conflict between the remand ordered by the court below and any decision of either this Court or another court of appeals, and presents no issue otherwise appropriate for review by this Court.

There is presently pending before the Court a petition by respondents for a writ of certiorari to review other issues decided by the court below on which guidance from this Court is plainly necessary. *National Football League, et al.*, v. *Oakland Raiders, Ltd. and Los Angeles Memorial Coliseum Commission*, No. 86-1972 (filed June 10, 1987). Review by this Court of those issues may well moot the distinctly subsidiary issue raised by the Raiders in this petition, which in any event was correctly decided by the court below.[1]

COUNTERSTATEMENT OF THE CASE

The background and prior proceedings are fully set forth in the petition in No. 86-1972. We briefly describe the proceedings below that relate to the remand challenged by the Raiders.

The liability phase of this bifurcated trial resulted in a judgment in favor of petitioner and an injunction against the League, which were affirmed by the Court of Appeals. (A-46 to A-95)[2] In affirming, the Court of Appeals stated: "We review only the liability portion of the bifurcated trial; the damage

[1] We concur with the concluding comments of the Raiders' petition concerning the importance of sports-antitrust issues and the significance of professional sports in American life. (Pet. at 20) The public interest in these matters is best served by addressing directly the issues raised in No. 86-1972.

[2] The proceedings were bifurcated at plaintiffs' request and over the NFL's objection.

phase was concluded in May 1983 and is on a separate appeal." (A-47)[3] Although the Court of Appeals expressly acknowledged that "the NFL teams are not true competitors, nor can they be", (A-60) and that "NFL football requires some territorial restrictions . . . to secure each venturer the legitimate fruits of that participation", (A-68) it affirmed a jury finding that the League's disapproval of the Raiders' transfer to Los Angeles violated Section 1 of the Sherman Act. In so holding, the court put principal emphasis on perceived defects in the "procedural mechanism" by which the League administered Rule 4.3 of the League agreement, which governs team transfers. (A-69, A-71)

The trial of petitioner's claim for damages resulted in a money judgment in favor of petitioner of approximately $35 million after trebling. The NFL's appeal from this judgment was heard by the same panel that had affirmed the earlier judgment of liability. The court below held that the opportunity to place an NFL team in Los Angeles belonged to the League as a whole, (A-25, A-26, A-29) and that the Raiders' damages should be offset to reflect their unilateral seizure of that valuable business opportunity. The offset was to equal the amount by which the value to the League of the Los Angeles opportunity seized by the Raiders exceeded the value of the opportunity to place a team in Oakland, which was surrendered by the Raiders when they left Oakland. (A-27 to A-28) The court accordingly vacated the money judgment in favor of the Raiders and remanded to the District Court to determine the amount of the offset and the Raiders' actual damages, if any. (A-34)

Whether by design or inadvertence, the Raiders overlook the unanimity of the Court of Appeals in determining the appropriateness of this offset. The court, without dissent, found that "[t]he district court . . . erred in refusing to admit evidence of the full benefits of the Los Angeles expansion opportunity received by the Raiders, and in refusing to instruct the jury on the NFL's offset defense." (A-29) Judge Nelson dissented only from the court's determination that the offset should be applied to reduce

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[3] Thus, the District Court's decree of June 14, 1982, provided for retaining jurisdiction in order to, *inter alia*, "determine the damages recoverable . . . against defendants." (A-99)

the single damages that the jury had found in favor of the Raiders. (A-41 to A-45) In her view the offset should be applied only to reduce the amount of the judgment after trebling.[4]

The Raiders challenge both the allowance of the offset and its deduction from the single damages found by the jury.

REASONS FOR DENYING THE WRIT

I. No Issue Of Res Judicata Is Presented

The Raiders' primary contention is that the Court of Appeals' correction of the District Court's error in failing to admit evidence and properly instruct the jury in the damage trial "flouts *res judicata* principles." (Pet. at 7) This argument misconceives the decision below and has no support in the principles of *res judicata*.

Far from depriving the Raiders of their earlier judgment, the Court of Appeals' opinion on damages expressly reaffirms the earlier grant of injunctive relief, pursuant to which the Raiders have played in Los Angeles since 1982, and pursuant to which they will continue to play in Los Angeles. (A-26, A-27) For the past five years, the Raiders have enjoyed the considerable financial benefits of a Los Angeles address without paying for that franchise territory and have also continued to receive all the benefits of membership in the NFL. None of that is altered by the opinion below on damages. The court made clear that its focus was not on the injunctive relief that it had previously affirmed, but rather on the windfall received by the Raiders—a windfall that it found should be "taken into account when awarding *additional* damages beyond the injunctive relief." (A-27) (emphasis in original) There has been no "retool[ing of] a judgment" for an injunction as the Raiders claim; (Pet. at 9) instead, the court below merely vacated a judgment that awarded money damages not limited to the actual extent of the injury.

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[4] As to the appropriateness of the offset, Judge Nelson said: "I also agree that the value of the Los Angeles opportunity, improperly conferred upon the Raiders by the district court's injunction, should be returned to the NFL." (A-41)

Without citation of authority, the Raiders claim that "[t]he decision that the NFL could not lawfully keep the Raiders out of the Los Angeles Coliseum did not mean that NFL could charge the Raiders for letting it in." (Pet. at 8) Presumably this is intended to suggest that a finding of antitrust violation in support of an injunction authorizes a damage claimant to appropriate the violator's property. However, as both *Hanover Shoe* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), establish, an antitrust violation does not preclude a violator from obtaining compensation for the use of his property. The Court of Appeals simply applied the teachings of these cases and did nothing to disturb the injunction previously issued in the Raiders' favor.

The Raiders' argument also depends on a mistaken view of *res judicata*. That doctrine only prohibits relitigating issues once there has been a final judgment on the merits of an action. *Res judicata* is intended to prevent two *separate actions* but does not prevent timely appeals on all issues decided when a trial is bifurcated. *See* Restatement (Second) of Judgments § 13 (1982).

This is not a case in which the NFL has attacked the injunction in a separate action, or has denied its effect. Rather, a panel of the Ninth Circuit—the same panel that heard the initial appeal—has reviewed and vacated a subsequent judgment for money damages in favor of the Raiders while leaving intact the injunctive relief that entitles the team to play in Los Angeles. No issue of *res judicata* is presented and it is not surprising that the Raiders can offer no authority for their extraordinary view of the law.[5]

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[5] The Raiders' argument, if accepted, would make appellate review a hollow remedy. The NFL had no reason to present its offset defense prior to the damages trial. If the Raiders' view of *res judicata* were accepted, the Ninth Circuit would have been powerless, because of the outstanding injunction, to correct the District Court's error in refusing to allow the NFL to present its offset defense and in refusing to instruct the jury on that defense.

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981), offers no support for the Raiders' novel view of *res judicata*. In *Moitie*, a party whose federal case had been dismissed and who did not appeal that dismissal, sought to bring a second action in state court based on the same facts. This Court, in a straightforward application of settled law, held that a second action could not be maintained. 452 U.S. at 398-402. *Moitie* has no application to this case, where a bifurcated trial predictably resulted in separate appeals and where the appellate court did no more than rule on various legal and factual issues in the order that those points were necessarily presented.

In the end, the Raiders' argument is based not on *res judicata*, but rather on an asserted "inconsistency" in the two opinions of the Ninth Circuit. The Raiders claim that the more recent opinion "*rests* upon the inconsistency" and must therefore be wrong. (Pet. at 8) (emphasis in original) The alleged "inconsistency" is the court's holding that the value of the Los Angeles opportunity "belonged to the league as a whole, or in other words, was owned in part by each franchise owner." (A-26) Petitioner characterizes this holding as

> "a different way of expressing precisely the contention on which [Judge Williams] had unsuccessfully dissented from the previous decision on liability, *viz.*, that NFL and its members are an 'entity', and that the right to play football in the National Football League in Los Angeles is property of that 'entity' for which it can charge a price to any member wishing to move." (Pet. at 6)

The inconsistency between the two decisions is not, however, that identified by the Raiders. Apart from other objections to its holding on liability, it clearly was consistent for the court below to conclude that the League had not employed proper procedures in excluding the Raiders from Los Angeles, and also to conclude that the League had a valuable property right in the Los Angeles location that the Raiders, having appropriated it, should account for in any damage calculation. The only inconsistency in the two decisions is between the court's conclusion that the League did have a common property right in the Los Angeles opportunity

and its conclusion that the League was not free under the Sherman Act to protect that right. This latter conclusion is the subject of the Petition in No. 86-1972.[6]

II. The Opinion Below Properly Determined The Offset Issue, And Did So In A Manner Consistent With Antitrust Law And Policy

A. No Conflict Exists Between The Resolution Of The Offset Issue By The Court Below And Any Decision Of This Court Or Any Other Court Of Appeals

The Raiders can point to no conflict between the opinion below and any opinion of this Court or another court of appeals on the appropriateness of an offset in the circumstances presented in this case.

The Court of Appeals relied on three different lines of authority, each of which separately established the error in the District Court's failure to admit evidence and instruct the jury on the offset. The first, based on decisions such as *Hanover Shoe* and *Siegel* v. *Chicken Delight,* establishes that a damage award must reflect not only a plaintiff's losses, but also "benefits that would not have been received by the plaintiff had there been no violation. . ." (A-23) By moving to Los Angeles, the Raiders "appropriated for themselves the expansion value that had accumulated in Los Angeles." (A-26) The value of the Los Angeles opportunity was largely attributable to "the NFL's well-established and widely followed nationwide entertainment product", and not to any antitrust violation. (A-25) Because the NFL's successful joint production and marketing of its product made Los Angeles a valuable expansion opportunity, the court correctly concluded that any damages awarded to the Raiders had to take into account the valuable property right the Raiders had obtained.

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[6] The Raiders' invocation of Federal Rules of Civil Procedure 42(a) and (b), and 54(b) (Pet. at 7) is a transparent and flawed effort to assert a contention of some broader significance. There has been no transgression of these rules and the decision below creates no threat to their continued utility.

Second, relying on *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *MCI Communications Corp.* v. *American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); and *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), the court below held that an offset was appropriate where, as here, a damage judgment "includes damages which go beyond the scope of the adjudicated antitrust liability." (A-24) Because the NFL's development of the Los Angeles opportunity was lawful, "an award of that opportunity to the Raiders would constitute a recovery for conduct of the NFL which was not found to be illegal." (A-26) Thus, the Raiders had been given "a windfall benefit" that exceeded "the scope of the antitrust verdict", and an offset to the damage award was appropriate. (A-27)[7]

Finally, the Court relied on a line of cases (*e.g.*, *Albrecht* v. *Herald Co.*, 452 F.2d 124 (8th Cir. 1971)) establishing that a plaintiff may recover damages based on either "lost profits" or the "value of a business", but not both. (A-31 to A-32) Should the Raiders be awarded both the Los Angeles business opportunity, the value of which is its potential profitability, and the interim lost profits for 1980-82, the Raiders would improperly receive a double recovery.

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[7] There is substantial question as to whether any award to the Raiders is consistent with the teachings of *Brunswick*. The sole basis on which antitrust damages may be awarded is for injuries "of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendant's acts unlawful." *Brunswick*, 429 U.S. at 489. The only restraint on competition identified by the court below was the prevention of competition between the Raiders and the Rams in Los Angeles, and, to be recoverable, any damages must flow from that restraint. But the Raiders' evidence on damages completely ignored the presence of the Rams, and assumed, for example, that the Raiders could charge substantially higher prices for tickets, advertising, and the like, notwithstanding the presence of a competitive alternative. Thus, the judgment below took no account of such competition and awarded damages solely on the basis of what the Raiders projected they would earn in Los Angeles, as if merely keeping the Raiders out of Los Angeles, irrespective of any impact on competition that the Sherman Act is designed to protect, were a violation.

The Raiders complaint that they were not heard below on the offset issue (Pet. at 5 n.5) is without merit. They were sufficiently aware of the NFL's offset defense to devote an entire section of their brief in the court below to that issue. They argued to the trial court that one aspect of the NFL's defense was an "attempt to offset the damages suffered by the Raiders by an increase in value attributable to the Raiders' franchise being in Los Angeles. . ." (CR 2376 at 2) And the League squarely asserted its right to control the disposition of the Los Angeles opportunity in both the liability and the damages trials and requested instructions on the offset issue at the damages trial. (CR 1090, 2042)[8]

In an effort to create the appearance of a conflict, the Raiders cite this Court's decision in *Randall* v. *Loftsgaarden*, 106 S. Ct. 3143 (1986). That case presented no issues under the antitrust laws, and instead required this Court to reconcile several different remedial provisions of the securities laws, one of which provided that a plaintiff may recover no more than "his actual damages on account of the act complained of." 106 S. Ct. at 3148, *citing* § 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a). This Court concluded that tax benefits need not be offset against a damage award under that statute. 106 S. Ct. at 3150. The case involves only construction of one section of the 1934 Securities Exchange Act, and has nothing to say about the proper computation of damages for violations of the antitrust laws.[9]

[8] References to "CR" are to the Clerk's Record in the District Court and to Tr.2d are to the transcript of the second liability and the damages trial.

[9] Because *Randall* focused on the proper treatment of tax benefits, it plainly has no application here. But even as to tax benefits, *Randall* broke no new ground. In *Hanover Shoe*, 392 U.S. at 503, this Court similarly refused to offset taxes in computing antitrust damages.

B. The Offset Does Not Deny Petitioner Any Relief To Which It Is Entitled Under The Injunction

By virtue of the District Court's June 1982 injunction, the Raiders presently play in Los Angeles, and were permitted to acquire a franchise opportunity that the Court of Appeals found belonged to the NFL as a whole and that could otherwise have been sold by the League and the proceeds distributed for the benefit of all the members.

The excess value of that franchise over the value of the Raiders' Oakland franchise was plainly recognized throughout the case. Thus, the Raiders' managing partner "testified that the Raiders increased their value by some $25 million by moving to Los Angeles." (A-26) Counsel for the Raiders in his questioning demanded that NFL Commissioner Rozelle agree that a new Los Angeles franchise "is worth at least $20 million more" than a new Oakland franchise. (Tr.2d 3153) And in final argument, Raiders' counsel referred to "the hundred-million-dollar jackpot in Los Angeles." (Tr.2d 7562) In short, as the Court of Appeals held in its second opinion—its first opportunity to consider the issue—the Raiders seized a valuable business opportunity from the remainder of the League as a result of the injunction.

The Raiders are flatly wrong to contend that the decisions below force them to choose between injunctive relief and damages. (Pet. at 11) The decisions entitle the Raiders to play in Los Angeles but do not authorize them to take from their League partners the value of that opportunity, which is not tainted with illegality. If the interim lost profits found by the jury are greater than the amount by which the value of a Los Angeles franchise exceeds the value of an Oakland franchise, the Raiders will receive that difference three-fold. The Raiders have no more been forced to choose between damages and equitable relief than were the plaintiffs in *Hanover Shoe* or *Siegel* v. *Chicken Delight*. They are simply being precluded from enjoying as a windfall benefit a property right that belonged to the League.

Concerned that the offset may wipe out the damages found by the jury, the Raiders mistakenly argue that because the Clayton Act provides for both damages *and* injunctive relief, (Pet. at 11) a litigant is entitled as of right to both. In a consistent line of decisions this Court has made clear, however,

that antitrust damages do not flow from a violation as a matter of course, but only where a plaintiff makes "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Brunswick*, 429 U.S. at 489. As Professor Areeda has counselled, this may properly result in an antitrust "injury that does not warrant a damage award." P. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L.Rev. 1127, 1128 (1976).

C. The Offset Is Properly Deducted Before Trebling In Determining Petitioner's Actual Damages

Relying solely on cases involving settlements and unrelated counterclaims, the Raiders assert that the Court of Appeals erred in directing that the offset be deducted prior to trebling. (Pet. at 15-17) This case involves neither a settlement nor a counterclaim, but rather a windfall recovery growing out of the very transaction that was the occasion of the violation and the Raiders' interim loss of profits. The authorities are consistent as to how offsets should be handled in such cases, and the Court of Appeals properly determined that such a windfall served to reduce or eliminate the Raiders' actual damages.

The Raiders rely chiefly on the dissenting opinion of Judge Nelson, while failing to note precisely how narrow that dissent was. There was, as has been indicated, no disagreement among the court that the award to the Raiders of the Los Angeles opportunity was a windfall. (A-41) Similarly, Judge Nelson concurred that offsets related to the antitrust violation should be deducted prior to trebling. (A-42) In her view, "the court should *separately* assess all offsets which are not related to the pre-trebled damage calculation. That is, offsets which do not flow from the violation itself should be deducted *after* trebling." (Id.) (emphasis in original)

In short, the only disagreement expressed in the opinions below was whether the windfall in this case was sufficiently related to the Raiders' transfer to Los Angeles that it should be deducted before or after the trebling of the interim loss of profits found by the jury. The court's resolution of that question—that the offset "should occur prior to trebling" (A-31)—rests on the

facts of this case, and presents neither a conflict nor a legal issue that demands resolution by this Court. The seizure of the League opportunity resulted when the Raiders moved to Los Angeles. The interim loss of profits on which the jury's award was based was intended to compensate for the delay in the move to Los Angeles. It is difficult to conceive of a case in which the damage award and the source of the offset are more intimately related.

This Court's holdings in *Hanover Shoe*, *Brunswick*, and *J. Truett Payne*, all require that a plaintiff's recovery be limited to three-fold its actual damages. In *Siegel* v. *Chicken Delight*, the Ninth Circuit correctly applied this rule of law and reduced plaintiff's damages prior to trebling. The Fourth Circuit reached a similar result in *Burlington Industries, Inc.* v. *Milliken & Co.*, 690 F.2d 380, 385-86, 391 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983) (offsetting before trebling "the amount which plaintiffs would have paid . . . in the absence of the royalty-maintenance conspiracy.").[10] And in *Telex Corp.* v. *IBM*, 367 F. Supp. 258, 352-53 (N.D. Okla. 1973), *aff'd in part and rev'd in part on other grounds*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), the court upheld an offset based on plaintiff's unlawful misappropriation of IBM's trade secrets; because "plaintiff's prospective market position . . . would have included [this] competitive advantage", an adjustment was required "before plaintiff's damages are trebled." *Id.* The court in *Telex* considered and distinguished many of the counterclaim and settlement cases cited by Judge Nelson's dissent on this issue.

Because this case does not involve a deduction of an unrelated counterclaim, cases such as *Jerard Associates Inc.* v. *Stanley Works*, 1966 Trade Cas. (CCH) ¶ 71,820 (S.D.N.Y. 1966), (Pet. at 16) are inapposite. Cases involving deductions of settlement amounts are even further removed from the issue at hand. A settlement, by definition, is not part of the underlying transaction, but rather a subsequent reduction of already accrued damages. Thus, to deduct amounts received in settlement before

[10] The court in *Burlington Industries* specifically distinguished the treatment of related offsets and amounts received in settlement, deducting the former *before* trebling and the latter *after* trebling. *Compare* 690 F.2d at 385-86, *with id.*, at 391-92.

trebling would deprive a plaintiff of its entitlement under Section 4 to receive three times its actual damages. Further, a rule requiring the deduction of settlement amounts before trebling would create a powerful disincentive for antitrust plaintiffs to settle. Neither of those concerns apply in this case and petitioner's reliance on such cases simply underscores the validity of the holding below.[11]

D. The Offset Creates No Immunity From The Antitrust Laws

The decision below leaves intact—mistakenly, in respondents' view—a judgment that the League and its members violated Section 1 of the Sherman Act. Under the District Court's injunction, respondents may not inhibit petitioner from presenting the League's joint product in Los Angeles. And respondents remain liable to the Raiders for treble such actual net damages as may be found on remand, as well as for costs and attorneys' fees.

Under these circumstances, the suggestion that respondents have somehow been immunized from the antitrust laws is not merely disingenuous; it is plainly false.[12] Nor does the opinion establish any concept of territorial exclusivity. (Pet. at 20) Instead, it holds that one member of a lawful joint venture may not appropriate for itself a property interest that properly belongs to the venture as a whole, or as applied to this case, the League is not required by the antitrust laws to give away even to one of its members the "fruits of its success . . . " *Berkey Photo*, 603 F.2d at 298.

Moreover, as the decisions in *Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), and *Hanover*

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[11] The Raiders' reliance on the Ninth Circuit's recent decision in National Basketball Association v. SDC Basketball Club, Inc., 815 F.2d 562, 570 (9th Cir. 1987), (Pet. at 17) is misplaced. That case merely refused to award damages to the NBA for a lost expansion opportunity on a motion for summary judgment. It did not, however, question either that an offset is appropriate in this case or that the deduction should take place prior to trebling.

[12] The Raiders lengthy—and often mistaken—description of various pieces of legislation that Congress has considered over the past three decades (Pet. at 18-20) demonstrates that, far from being immune, sports leagues remain subject to the antitrust laws.

Shoe demonstrate, antitrust policy has long recognized the proper role of offsets in preventing windfall recoveries and in limiting damages to actual losses attributable to conduct forbidden by the antitrust laws. *See also Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1354 (1986); *Brunswick, supra.* Although the Raiders claim that the decision below will cripple private enforcement of the antitrust laws, (Pet. at 15) the court below was sensitive to that concern, and struck the proper balance between encouraging private enforcement and awarding damages in a manner consistent with settled law. (A-30 to A-31) The availability of injunctive relief and the recovery of costs and attorneys' fees—as well as the prospect of a three-fold recovery of their *actual* damages—should offer more than sufficient incentive for aggrieved parties to bring suit. *See* II P. Areeda & D. Turner, *Antitrust Law* ¶ 347d at 257 (1978). As the court below noted, "[n]o case cited by the Raiders stands for the proposition that encouragement of antitrust suits requires a damage recovery (before trebling) to go beyond the extent of the plaintiffs' actual injury." (A-31)

CONCLUSION

The petition presents no issues that create a conflict or are otherwise worthy of review by this Court and, accordingly, should be denied.

Respectfully submitted,

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